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# Transcript of proceedings Volume II, Part 2, pages 377-441

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*Court Reporter*

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1 the next question I think I have already resolved,  
2 we got into a dispute at one of the earlier hearings  
3 as to how the water for the fish hatchery would be  
4 allocated in the event when the eventual qualification  
5 is covered here, and I think I covered that in an ear-  
6 lier order here.

7 What evidence are you, and I don't want to  
8 restrict you from making a record on matters which  
9 are not res judicata, but --

10 MR. VEEDER: I don't know of anything that I am  
11 speaking about now that is res judicata, Your Honor.  
12 I am speaking about water sources. I don't know.  
13 There is nothing in the record here at this time in  
14 regard to the sources of water that we are witnessing  
15 here, and I think that when we get into an issue where  
16 we move later in the day in regard to what it means  
17 to prorate water, I think it would be a very good idea  
18 and, at least, I would urge you to give consideration  
19 to what water is the mingled water that the Tribe  
20 pumps into the system, and the natural flow water.

21 I think those are extremely important  
22 because, certainly, there is no basis for prorating  
23 the water that the Tribe pumps into the stream, and  
24 so I was going to --

25 THE COURT: Well, there isn't any dispute that

1           waters are pumped into the stream by the Tribe, is  
2           there? Is there a dispute as to that?

3           MR. VEEDER: No. In that regard, I have a Motion  
4           for Judgment on the Pleadings that is pending here in  
5           which Mr. Price has not denied our charges that Mr.  
6           Walton is diverting water that we pump into the stream.  
7           There is no contest on that. He hasn't answered it.  
8           The motion is pending, and I am going to, before the  
9           day is over, I am going to ask you to rule on it.

10          THE COURT: You just filed it yesterday, didn't  
11          you?

12          MR. VEEDER: No, no, no. This has been filed  
13          three or four months ago, Your Honor.

14          MR. PRICE: This has been filed three or four  
15          times. This has been ruled upon by this Court.

16          MR. VEEDER: What are you talking about? I am  
17          talking about a Judgment on the Pleadings.

18          THE COURT: We're getting way off in left field.  
19          As I say, I am going to permit you people to develop  
20          the evidence that's relevant to the issues before the  
21          Court. I don't want to restrict you, but I think we  
22          should get some sort of a timetable here because I  
23          think the real issues are relatively narrow that I  
24          can consider here.

25          MR. VEEDER: Well, maybe Your Honor would rule



1 now and then save a lot of time. When you apportion  
2 water and this -- assuming that we proceed on the  
3 basis of irrigable acreage -- is it your intention  
4 to prorate the water that the Colvilles pump into the  
5 stream at great cost, is that water going to be  
6 prorated? I think it is extremely important to know.

7 If it is, I think we ought to get a ruling  
8 on it now because there is really no case at all. If  
9 we are going to prorate pumped water, if that's going  
10 to be the ruling, then I think we ought to go on  
11 appeal now, and I think we ought to maintain the status  
12 quo until that matter is resolved.

13 THE COURT: Well, gentlemen, you have filed  
14 voluminous briefs on this yesterday. We are just in  
15 the process of taking testimony. I am not going to  
16 make any sudden ruling on a major issue in this case.  
17 This is a case that's important to these people, and  
18 I am going to give it considered judgment, but all I  
19 am trying to do is see if you people, in your exercise  
20 of judgment as lawyers, are presenting evidence that's  
21 pertinent to the issues.

22 Now, if you represent to me that it is --

23 MR. VEEDER: I represent very strongly that it  
24 is.

25 THE COURT: I haven't prevented it.



1 MR. VEEDER: I am representing here, and I want  
2 to have the issue into the record, that it is the  
3 position of the Colville Confederated Tribes that the  
4 waters that are pumped into No Name Creek by the  
5 Tribe, now, that water is personal property. The law  
6 is clear on it, and we are saying that that water is  
7 not subject to proration by this Court.

8 THE COURT: All right. That's a legal question,  
9 I assume.

10 MR. VEEDER: I think it is, but I think it becomes  
11 very important as to distinguish between the pumped  
12 water in the stream, and the water that historically  
13 has been there, and the water that is there now, the  
14 natural flow water that drains out of the aquifer that  
15 lies largely under the Colville land.

16 THE COURT: Was this issue addressed in an earlier  
17 trial?

18 MR. PRICE: Ad infinitum, Your Honor. If I  
19 might have just a moment of the Court's time --

20 THE COURT: Yes.

21 MR. PRICE: The question of what water was in  
22 the aquifer, which of that water was forced up into  
23 springs at the north end of the Waltons' property  
24 which became a surface diversion which became No Name  
25 Creek, which of those waters were supplemented by

1           springs on the Waltons' property that flows through  
2           his property, which of those waters got over the  
3           granite lip, and what happened to them after that,  
4           we have a week of testimony on that by the plaintiffs  
5           themselves.

6                     The question was presented to Judge Neill,  
7           to Judge Vorhees, and to the 9th Circuit.

8                     MR. VEEDER: That's crazy.

9                     THE COURT: Mr. Veeder, if you would wait until  
10          Mr. Price finishes, please.

11                    MR. PRICE: That Mr. Walton was illegally  
12          diverting waters, the developed waters question, the  
13          waters in that aquifer were determined by the Court  
14          to be available for the parties in that valley, and  
15          if the Tribe is going to pump them upstream from the  
16          Walton property, that took away from the natural  
17          occurring springs that would necessarily generate  
18          that stream flowing across the surface of his land,  
19          and thereby deprive him of a certain amount of that  
20          water.

21                    The Court answered the question that  
22          developed water was not going to be applied in this  
23          case. That ruling was appealed and became the law  
24          of this case and this Court has indicated it will not  
25          reconsider that question.



1 I don't think that Mr. Veeder can continually  
2 burden the defendants with coming back and trying to  
3 relitigate those portions of this case which he is  
4 not satisfied with. We have gone through this several  
5 years in a row on Motions for Preliminary Injunction  
6 at the start of each irrigation season raising the  
7 question that Walton was illegally diverting water,  
8 and the Court has consistently ruled against the  
9 Tribe in that matter.

10 We are not prepared to have to defend against  
11 that position once again. It has been briefed to the  
12 point that the file is substantially sufficient with  
13 arguments on all sides. It has been amply argued.  
14 The testimony of Mr. Watson went on for approximately  
15 a week as to all of these issues --

16 MR. VEEDER: That is untrue.

17 MR. PRICE: -- and I find it offensive to my  
18 client that we have to be subjected to this. It  
19 just becomes onerous.

20 THE COURT: Well, it always creates a problem  
21 when a case of this nature is tried extensively in  
22 the District Court and is appealed, and then goes back  
23 to a judge who was not involved initially. It presents  
24 some problems. I have to rely upon you people as to  
25 what was in the record before, unless you want to

1 adjourn these proceedings and I spend the next couple  
2 of weeks reading it.

3 MR. VEEDER: Well, Your Honor, as long as you  
4 are going to have misrepresentations made to you by  
5 Counsel, Counsel for Mr. Walton, we are going to have  
6 problems. What I'm saying to you is that this issue  
7 in regard to what waters are subject to allocation  
8 under the rule of the 9th Circuit has never been  
9 considered, and it has never been before this Court.

10 Now, what you are being asked to do, as I  
11 perceive it, is to say, yes, we are going to have an  
12 allocation on an irrigable land basis, but we are not  
13 going to decide what waters are subject to that alloca-  
14 tion.

15 Now, that is going to be an interesting  
16 phenomenon because there is in a state of nature  
17 about a half second foot of water. Now, that half  
18 second foot of water was committed to use on the  
19 Timentwa properties 27 years before the Waltons showed  
20 up.

21 Now, those lands were irrigated and they  
22 were utilized. Now, the Waltons have put in a well.  
23 They have changed the regiment of the stream by the  
24 wells. The whole thing is down to a point now that  
25 we could have an allocation on the basis of irrigable



1 acreage and no one would have the remotest idea  
2 what's going to be apportioned. That's where we are.

3 THE COURT: That's probably why this Court of  
4 Appeals begged the Supreme Court to hear this case, and  
5 they decided not to hear it.

6 MR. VEEDER: I begged them to do it, but the  
7 Department of Justice turned against it.

8 THE COURT: They didn't hear it, though.

9 MR. PRICE: Your Honor, Mr. Sweeney probably  
10 doesn't want to become embroiled in this, but might  
11 be able to advise the Court that this issue on these  
12 developed waters has been resolved in the Waltons'  
13 favor on several occasions that has been before this  
14 Court previously.

15 THE COURT: All right. Go ahead, Mr. Sweeney.  
16 You get a turn.

17 MR. SWEENEY: It has been ruled upon in a sense  
18 that Mr. Walton has been allowed to divert waters that  
19 are necessary for his irrigation operation from the  
20 waters that were being turned into the -- excuse me,  
21 Mr. Veeder, if I might step to the podium.

22 The genesis of the developed water theory  
23 that Mr. Veeder presents really took place contem-  
24 poraneously with the July 1976, testing program and  
25 so forth. It was at that time that the Tribe embarked

1 upon the irrigation procedure including -- eventually  
2 it also included the spawning of the trout in the  
3 lower reaches of No Name Creek Allotments 901 and  
4 903, and at that point, the Tribe put in their irriga-  
5 tion wells with the pumps and began pumping water  
6 down the stream to supply 901, 903, and the spawning.

7 Now, all of that was done really without  
8 prejudice to the rights of the parties in the litiga-  
9 tion. That was one of the predicates upon which those  
10 things in which the Tribe developed its program, and  
11 then also that the testing program, when it went ahead  
12 by the U.S. Geological Survey.

13 It is true that approximately half a second  
14 foot was the figure that had been testified to in  
15 the previous hearing as being about the amount of the  
16 natural flow which would have been there; however,  
17 that has been changed because of the numerous wells  
18 that have been installed by the parties.

19 Judge Neill allowed the Waltons to divert  
20 water including that water that was developed onto  
21 their lands from their diversion point into the sump.

22 That same thing was also approved by Judge  
23 Vorhees in his Interim Order, and I really can't say  
24 whether that was presented at the Circuit because I  
25 wasn't there, and I would have to go back and review



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the briefs.

THE COURT: I don't recall it being discussed in the Circuit Opinion, was it?

MR. SWEENEY: No, it was not, I don't believe.

THE COURT: All right.

MR. VEEDER: I would like to know what Mr. Sweeney said.

THE COURT: Pardon?

MR. VEEDER: Is Mr. Sweeney saying to this Court that it was determined by Judge Vorhees in his July 19, 1979 Order, that Mr. Walton could take and divert and utilize the water we pumped into the stream? Did he say that? I want you to read this, Mr. Sweeney.

MR. SWEENEY: Well, I would be happy to read it again.

Well, Your Honor, this states, as Mr. Veeder points out, as part of, I guess it was Judge Vorhees' Order, the July 17, 1979 Order, "That the Defendants Walton shall not interfere with the delivery of any ground waters placed in the creek by the Tribes designated for the beneficial use downstream. Any such water diverted by Defendants Walton shall not be chargeable to the 428.8 acre of water so allocated to the Tribe."

That meant, as I recall, that the Waltons

1 would still be authorized to divert that amount of  
2 water which would represent what would have been the  
3 natural flow coming down the stream; however, that's,  
4 of course, very difficult to determine. As a matter  
5 of fact, under this Order and also by subsequent Orders  
6 of the Water Master that was appointed by Judge Vorhees,  
7 the Waltons were authorized and did continue to divert  
8 waters out of the bed of the stream into their sump  
9 for their irrigation. That's all I'm saying.

10 MR. VEEDER: Mr. Sweeney, didn't the Water Master  
11 shut down Mr. Walton that year from pumping? Didn't  
12 he?

13 THE COURT: Well, we are getting a little far  
14 afield.

15 MR. PRICE: Your Honor, I don't think we are  
16 into a cross-examination of Mr. Sweeney.

17 THE COURT: All right. You might mull this  
18 over between you. I don't know of any reason why I  
19 would conclude now that you could possibly agree on  
20 anything. You haven't done it in the last seven or  
21 eight years, but I will take a look at some of these  
22 things and come back.

23 I just want everybody's position on the issues  
24 that are left to be resolved to be fully presented so  
25 that whatever I do with them, if I am wrong, I can be



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told by the higher authorities.

So, we will recess until a quarter until  
two. Gentlemen, is that acceptable?

MR. VEEDER: That's fine.

MR. SWEENEY: Yes, Your Honor.

THE COURT: Then, we can run a little late tonight  
if necessary, Mr. Veeder.

(The noon recess taken at this  
time.)

1 AFTERNOON SESSION

2 May 6, 1982

3  
4 THE COURT: Counsel, along the lines you were  
5 just discussing prior to lunch, I would like your  
6 interpretation of the language that the 9th Circuit  
7 used when they were setting down this criteria, and  
8 assume for purposes of this question that we were  
9 dealing here not with Mr. Walton, but with an allottee,  
10 where the Court said, "The extent of an Indian  
11 allottee's right is based on the number of irrigable  
12 acres he owns. If the allottee owns ten percent of  
13 the irrigable acreage in the watershed, he is entitled  
14 to ten percent of the water reserve for irrigation."

15 Assume that you had an allottee on this  
16 land rather than Mr. Walton, and assume that the water  
17 was located in primarily, say, in an underground  
18 aquifer primarily on another allottee's land. How  
19 would the entitled allottee get that water other than  
20 having it transported some way?

21 MR. VEEDER: How would there be an apportionment?

22 THE COURT: Say if they had ten allottees, and  
23 they each have the same number of irrigable acres,  
24 then they would each be entitled to ten percent of the  
25 irrigable water, right?



1 MR. VEEDER: Well, I wouldn't think so, Your  
2 Honor.

3 THE COURT: But, doesn't the Circuit think so?  
4 That's my question.

5 MR. VEEDER: I have read this language repeatedly  
6 and carefully because it's really the most important  
7 language.

8 THE COURT: Let me tell you what I think the  
9 language means, and then we can go from there.

10 It seems to me that it is rather clear, and  
11 to simplify it, say that you had this particular  
12 watershed that we are talking about here, and you  
13 had five allottees who owned, each owned, say, an  
14 amount of irrigable acres, and it is all allotted  
15 land. They each have a percentage of the reserve  
16 water proportionate to their irrigable acres, right?

17 MR. VEEDER: Well, that's certainly -- that is  
18 the language that could be taken.

19 THE COURT: Well, it can't have any other meaning  
20 to me, but assume that that's what it means, and  
21 coming back to this question of the water being  
22 pumped, if the allottee that was occupying Mr.  
23 Walton's land was entitled to the water, and it had  
24 to be transported in some way from another portion of  
25 the allotted land, wouldn't it be feasible, through

1           however procedure, cost sharing perhaps, that the  
2           water would be transported, if feasible, to the  
3           various persons entitled to it? Otherwise, one  
4           allottee would end up with all the reserved rights  
5           to the exclusion of the others.

6           MR. VEEDER: I think that the factual statement,  
7           the genre as presented, isn't present here. That's  
8           the problem.

9           THE COURT: I know it isn't present here, but  
10          I am trying to analyze this question.

11          MR. VEEDER: So, I think that what you are saying  
12          is that if we adhere to this concept to a ratable  
13          on an irrigable basis, and there is short supply of  
14          water, as there is here, the allocation would be on  
15          that percentage basis if we adhere to the explicit  
16          language in the 9th Circuit.

17          THE COURT: Well, I don't have any prerogative  
18          of deviating from the language of the Circuit as you  
19          do.

20          MR. VEEDER: Well, I might as well make it very  
21          clear here that one of the reasons why we are putting  
22          in comprehensive and explicit data and testimony is  
23          to demonstrate beyond question that the apportionment  
24          of water on a prorata basis restricted to irrigable  
25          acreage is not, and in most instances, cannot be a



1 just and equal distribution because, basically, and  
2 we went through this 25 years ago, that the Court of  
3 Appeals, using explicit language that it is using  
4 here, has gone to what we call the Tea Cup Theory;  
5 every acre of land is entitled to a tea cup of water,  
6 and no one gets enough water to make a beneficial  
7 use of it, if there is strict adherence to that  
8 concept.

9 THE COURT: Then, of course, I suppose the  
10 government could do something administratively, but  
11 in any event, I am attempting to get your views on  
12 not what you think the rules should be, or what I  
13 think it should be, or what Mr. Sweeney or anybody  
14 else thinks it should be, I am trying to get down  
15 to the rule that the 9th Circuit has mandated to this  
16 Court.

17 MR. VEEDER: I would like to proceed on that.  
18 I think that the 9th Circuit undertook to declare that  
19 under 28 US 381, which gives the Secretary of the  
20 Interior the power to make a just and equal distribu-  
21 tion of water among the Indians residing on the  
22 reservation, I think that they have reached in and  
23 taken that language from that statute, and undoubtedly,  
24 they did.

25 I think that they are saying that invariably

1 a proration on the basis of irrigable acreage and  
2 watershed always is a just and equal distribution if  
3 we take the literal language that we have before us,  
4 and if we take the literal language that we have  
5 before us, and take 105 acres of irrigable land for Mr.  
6 Walton, and 228 acres of irrigable land for the  
7 Colville Confederated Tribes, or whatever number we  
8 are going to use, we are going to be in the position  
9 where there won't be water available for use by  
10 anyone because if you are going to give 892, 901, 903,  
11 and the Walton allotments water on that prorata basis  
12 of irrigable land, you are going to find that you have  
13 no method of making a workable apportionment.

14 I know what the answer is. The mandate has  
15 to be followed not only as to the language, but to  
16 the spirit. I have been through this before. I know  
17 that the Remand means, but there is also a very  
18 important exception to the law governing mandates,  
19 and that is when the trial judge to whom the Remand is  
20 directed finds that he has an impossible situation,  
21 which could very well prevail here in making the  
22 allocation --

23 THE COURT: It has all the aspects of being that,  
24 but go ahead.

25 MR. VEEDER: It is about as difficult a problem as



1 a court could have, particularly in light of the fact  
2 that the available supply of natural flow water runs  
3 about a half second foot, and that the vast majority  
4 of the water in the stream throughout the irrigation  
5 season is pumped water.

6 Now, when we get down to that point, is  
7 this Court going to make the apportionment on an  
8 irrigable acreage basis on the natural flow, or is  
9 it going to make the apportionment on the basis of  
10 the enhanced flow, and I think that the Court --  
11 excuse me -- I think Your Honor has before you the  
12 issue.

13 It is like a bankrupt estate where you have  
14 got the heirs out here and they are prepared to  
15 participate in the estate, and the first thing that  
16 the Court has to do in a probate proceeding is to make  
17 a determination as to what the subject matter of the  
18 race is. What are we talking about? What is subject  
19 to apportionment?

20 THE COURT: All right. Well, let me get Mr.  
21 Sweeney and Mr. Price's version of this case. If,  
22 instead of dealing with Mr. Walton, this is an  
23 assumed hypothetical that we are dealing with an  
24 allottee that occupied his land, what did the Circuit  
25 say is the criteria, Mr. Price?

1           MR. PRICE: Your Honor, I think that raises an  
2 important point that we have raised from the beginning  
3 of this trial that all of the necessary parties are  
4 not here because you are raising the question about the  
5 allottees. This case is trying a case about allottees  
6 through a non-Indian.

7           THE COURT: Well, insofar as a factual determina-  
8 tion is made on the due diligence utilization question,  
9 then as I read this Opinion, Mr. Walton stands in the  
10 shoes of an allottee.

11           MR. PRICE: Yes. I take exception with the comment  
12 that you made. The Court seems to be in agreement  
13 with Mr. Veeder's statement that we don't have that  
14 situation here. We do. We can't segregate ourselves  
15 from the allottee. We start from the allottee's right.  
16 The allottee gets to share ratably and equally, and,  
17 in fact, the section of the U.S. Code which Mr. Veeder  
18 alluded to and the case in our trial brief states that  
19 the Secretary of Interior can do nothing but apportion  
20 proportionately. We have to start from the rights  
21 of the allottee.

22           The only thing we are determining here is  
23 how much of that allottee's right Mr. Walton succeeds  
24 to to the extent he succeeds to it, his right is the  
25 same as the allottee, and the portion that he succeeds



1 to has to be prorated equally and can be done not  
2 otherwise.

3 That's why I think Judge Vorhees, that's why  
4 this Court continually has refused and has denied, and  
5 we have documented from the Clerk's record the three  
6 Motions for Preliminary Injunction from '78, '79, and  
7 '81, each of them asking that the Waltons be  
8 enjoined from stealing water, as it were, because  
9 this is developed water, and on each of those three  
10 occasions the Court has denied that Motion finding  
11 the developed water concept is not appropriate where  
12 we are dealing with a reserved water. This is a  
13 different type of water right we are dealing with.

14 Those decisions, those denials on those  
15 Motions, the reason they are not referred to in the  
16 9th Circuit Opinion is because they were not appealed  
17 from. They become the law of the case. Even if they  
18 were appealed from, the 9th Circuit did not speak to  
19 that question. It then also becomes the law of the  
20 case.

21 So, in answer to Your Honor's question, we  
22 do not have to worry about who is taking what amount  
23 of water, other than keeping track of it so that we  
24 would know that the Waltons have used that amount of  
25 water, and either that's the extent of their share,

1           they have exceeded it or they have not exceeded it,  
2           and that the Indians have appropriated so much and,  
3           and they have exceeded it or have not exceeded their  
4           share.

5           THE COURT: What if, again, putting this case  
6           in the posture, eliminating for the moment the  
7           question of how much was diligently appropriated,  
8           and that's the only reason that I couched this question  
9           with respect to an allottee rather than a non-Indian  
10          owner, and assume that there was not adequate water  
11          down in the area of Mr. Walton's property, but there  
12          was ample water up north. How would he acquire the  
13          water assuming he is entitled to it?

14          MR. PRICE: That raises --

15          THE COURT: Would he have to pay a portion of the  
16          cost of pumping it and transporting it?

17          MR. PRICE: That, I don't think, I am prepared  
18          to respond to, Your Honor, directly at this point.

19          THE COURT: No, I realize you may not be today,  
20          but I think eventually that's one thing we may have to  
21          look at.

22          MR. PRICE: I would like to, at this point, say  
23          that our case is different in that standpoint in that  
24          the Walton's north irrigation well, as the plaintiff's  
25          exhibit shows, dips right into the aquifer from which



1 they all withdraw, and by the Indians withdrawing the  
2 amount of water they are to the north, they deplete  
3 the level of water in the Waltons' well, so that but  
4 for pumping to the north, the Waltons would have  
5 adequate water.

6 The Indian allottee on that land, if he  
7 were still there or she were still there, would have  
8 ample water to irrigate their acreage. In this  
9 situation, they are causing the shortage on the  
10 Walton property, so there should not have to be any  
11 payment.

12 The other question I would ask to defer  
13 and address in a brief.

14 THE COURT: All right. Mr. Sweeney, what do you  
15 think of my hypothetical question?

16 MR. SWEENEY: As if Mr. Walton -- if the land  
17 now owned by Mr. Walton were still owned by an allottee?

18 THE COURT: Yes.

19 MR. SWEENEY: We would agree that the statements  
20 set forth by the 9th Circuit is correct, that they  
21 would be -- they would have an equal priority date,  
22 and that they would have an equal right to the use of  
23 the water.

24 THE COURT: All the water in the reserved area?

25 MR. SWEENEY: Within that watershed, yes, Your

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Honor.

THE COURT: Okay.

MR. SWEENEY: Then, the equal and just distribution would come into play in the event that there were a water short period. There would be an equal diminution of each of the allottees who would be there if there was a water short situation.

THE COURT: Or, it may be that you would have to use the services of a master, a water master or someone depending upon --

MR. SWEENEY: A master, and the equal and just distribution which is derived from Section 381 of 25 United States Code, we feel implies that the Secretary or the government would have a right to determine if an equal and just distribution were required in a water short period, that he could make adjustments between different owners, say one has a more -- would suffer more from the loss of water than another water user.

THE COURT: That makes sense, I guess. Thank you, Mr. Sweeney.

All right. Let's go ahead. I realize I have taken some of your time, but what does it look like on a time basis, Mr. Veeder? Do you know approximately how long you will be?



1 MR. VEEDER: Well, I would think that with the  
2 matters that we have before us, it should run through  
3 tomorrow noon at least. I don't know how long the  
4 cross-examination is going to be, but we have  
5 witnesses that we are going to put on that are going  
6 to cover these various issues, that are now presented,  
7 including the witness now on the stand.

8 THE COURT: Would you outline for me briefly now  
9 what the nature of your additional testimony will be?

10 MR. VEEDER: Well, we are proceeding now -- I  
11 don't know what Your Honor is going to do about this  
12 issue of hydrology.

13 THE COURT: Well, as I said, I want the record  
14 to be as complete as is necessary here, and I want to  
15 avoid that which is unnecessary.

16 MR. VEEDER: No one wants to avoid it more than  
17 I, but I do think -- I don't know of any more important  
18 case in the western United States than this one here  
19 today. I am going to -- I would like to put in  
20 information as to what we perceive to be the available  
21 supply of water in the natural stream. I think that  
22 is extremely important, I think.

23 As I said before, we have to determine what  
24 is going to be apportioned; how it is going to be  
25 apportioned; who is going to make the determination,

1 and above all, what is going to be apportioned.

2 Secondly, I would like to go on to the  
3 issue, and this all relates to due diligence, I want  
4 to go on in regard to the issues raised particularly  
5 on cross-examination in regard to Mr. Kaczmarek where  
6 the question was repeatedly placed to him, "What is  
7 the acreage that you were saying on Mr. Walton's  
8 property is not entitled to receive any water," because  
9 now I am prepared to go into that in detail. The  
10 witness we have on the stand will go into detail on  
11 that.

12 THE COURT: All right.

13 MR. VEEDER: We are going to -- particularly, we  
14 will go from there into the history of the development  
15 on Mr. Walton's land, and evidence we have that we  
16 can present to this Court or show the history of the  
17 development which becomes extremely important in regard  
18 to due diligence. Now, that hasn't been done yet.

19 We have witnesses who will testify in  
20 regard to the lands actually irrigated in 1936, 1945,  
21 and maybe up to '63.

22 THE COURT: All right. Now, you think that will  
23 take you --

24 MR. VEEDER: It will certainly run out the rest  
25 of the afternoon. I would say by tomorrow afternoon,



1 we should be finished. Now, we may go faster than  
2 that.

3 THE COURT: Well, I don't want to crowd you.  
4 I am trying to juggle tomorrow's calendar around.  
5 What do you think you will be preparing?

6 MR. SWEENEY: Your Honor, we will not have any  
7 testimony. We will have some documents to present,  
8 and that would be it.

9 THE COURT: All right. Mr. Price?

10 MR. PRICE: Your Honor, I think the issues that  
11 Mr. Veeder spoke to, the acreage and development on  
12 the Walton land, would be appropriate. The matters  
13 of availability of water were litigated previously.  
14 The USGS testified. We had an expert called for that  
15 purpose. That has not been an issue that we are  
16 prepared to proceed to trial.

17 THE COURT: You mean the total amount of water  
18 available?

19 MR. PRICE: That was at the previous trial, and  
20 how is it going to be apportioned. I am suggesting  
21 to Your Honor that's a legal conclusion, and I am  
22 going to object to any testimony or expert testimony  
23 trying to be put into evidence with respect to that.

24 THE COURT: Well, I think when we get down to  
25 the bottom line on this case, whatever, if we get to

1 the point where it has to be a determination on appor-  
2 tionment, I think pretty clearly that's going to be  
3 my job.

4 MR. PRICE: The availability of water, Your Honor,  
5 was a matter that we fought about; we tried and con-  
6 tended it was 500 acre feet. The U.S. government  
7 indicated 1,000 acre feet. Waltons' position was  
8 about 1200 acre feet. To go back and try and open that  
9 up now, Judge Neill found approximately a thousand  
10 acre feet available, was available for beneficial use  
11 yearly. That became the law of the case. That has not  
12 been sent back for Remand to this Court.

13 I would ask that the Court not allow that  
14 matter to be opened at this point in time.

15 THE COURT: Well, I think it seems to me in my  
16 last Order, didn't I indicate that the previous findings  
17 on the availability of the water that was available, the  
18 quantities would be utilized?

19 MR. VEEDER: I didn't hear what you said, Your  
20 Honor.

21 THE COURT: I said, didn't in the earlier Order,  
22 I have got so many files in this case, didn't the  
23 Order provide that the calculations and the findings  
24 on the availability of water in the earlier trial would  
25 be the basis for proceeding in this trial? The Circuit,



1 I have noted specifically, referred to Judge Neill's  
2 findings on the -- I was trying to see if they found  
3 actually, or if they referred actually to the water  
4 available in the Opinion.

5 MR. PRICE: On Page 4 of your Order, Your Honor,  
6 you said, "Necessary data for quantification in a  
7 Judgement entered February 9, 1979, Judge Neill made  
8 findings pertaining to the diversion duty in the  
9 No Name Basin, and the irrigable acreage on the  
10 Indian allotments. Absent a showing of change in  
11 conditions, these figures shall be used in quantifying  
12 the parties' irrigable water."

13 MR. SWEENEY: Well, a thousand acre feet appears  
14 in the 9th Circuit Opinion as having been found to  
15 be available.

16 THE COURT: I thought it did somewhere.

17 MR. SWEENEY: Section 2, when they discuss the  
18 case below in referring to Judge Neill's finding.

19 THE COURT: Yes. The trial court found that a  
20 thousand acre feet per year would be available in the  
21 basin in an average year.

22 MR. VEEDER: I think we better take another look  
23 at what the Court of Appeals said there, Your Honor,  
24 because Judge Neill didn't make a finding on that. He  
25 said in his judgment, which is controlling, that there

1           should be; he didn't say there was. He said there  
2           should be.

3           THE COURT: Was that your intention to go into  
4           the issue of the amount of water available in the  
5           average year?

6           MR. VEEDER: No. I won't this time. No, I won't.  
7           I would try and live with what he said should be on  
8           the thousand acre feet. It is as to the availability  
9           of that water; what does it mean when we have a water  
10          master and he comes in taking Your Honor's order, how  
11          is he going to make the determination of what is the  
12          natural flow that would be there if they were not  
13          pumping.

14          Now, I think there are two different kinds  
15          of water here. I think there is the pump water, and  
16          it is our view that when we pump water, it is not to  
17          be apportioned. Now, we can say it is the rule and  
18          the law of the case; we can say all those things.

19          THE COURT: Would it be your argument that if you  
20          pumped water from the northern portion to the point  
21          that, say you put it in a pipeline and pumped it all  
22          to your southern water and you exhausted the water  
23          in the watershed that you could do that?

24          MR. VEEDER: I would think this, Your Honor --

25          THE COURT: That wouldn't make any sense.



1           MR. VEEDER: Within the allocation. You see,  
2 this is the point I am making is if there is a  
3 determination as to a thousand acre feet of water,  
4 if we use that number, although I don't think it is  
5 a good number, but if we were to use the thousand  
6 acre feet and the Indians were to pump their share,  
7 I don't believe anybody has a right to do that.

8           THE COURT: As long as that pumping of their  
9 share isn't diluting the share of others?

10          MR. VEEDER: That's right. Here is what I am  
11 saying: When Your Honor takes the subject matter of  
12 this case that is the water, the available water  
13 supply, and you allocate it and we pump within that  
14 allocation, and we put the water into the stream,  
15 that water is personal property and no one has the  
16 right to but the Tribe.

17           Now, here's where we are: I think that Your  
18 Honor will have to have the data before him, and I  
19 would like to have this witness put in, to make the  
20 determination as to what you are going to apportion.  
21 The real worrisome thing about the thousand acre  
22 feet is when we attack the thousand acre feet as a  
23 bad finding, Judge Neill changed his language in the  
24 judgment and said there should be a thousand acre  
25 feet. Now, that's not a finding, and I think that the

1 history is going to show that we have got less than  
2 a thousand acre feet available year in and year out.

3 THE COURT: I suppose it differs year to year.  
4 Mr. Sweeney, did you want to say something? I am  
5 going to permit you to go ahead in just a second.

6 MR. VEEDER: No, as far as I am concerned I would  
7 like to put on some evidence.

8 THE COURT: No. I am going to allow you to put  
9 on some testimony after Mr. Sweeney speaks.

10 MR. SWEENEY: Your Honor, I didn't think that  
11 this concept of who gets what in this developed water  
12 theory was going to come up, and I don't think there  
13 should be testimony admitted at this hearing to  
14 controvert what I believe is Judge Neill's finding  
15 as approved by the 9th Circuit that there is, on an  
16 average year, a thousand feet of water available within  
17 this No Name Creek Basin. That's the way the whole  
18 case was tried previously.

19 Now, as to whether or not pumping from within  
20 an allocation so long as it does not interfere with  
21 another user is appropriate, one of the problems with  
22 establishing the water rights here is it's done on an  
23 annual basis where it says that the Tribe is 666 acre  
24 feet per year based on their irrigable and potentially  
25 irrigable lands.



1           If the Tribe or the particular user uses or  
2 pumps all their water at a rate that would use up  
3 their entire entitlement within a few months,  
4 obviously that will have a dramatic affect on the  
5 other users on a particular time, and that has happened  
6 in the past.

7           THE COURT: Well, as far as the sharing of water,  
8 I don't think there is any question but what all the  
9 water in the basis is subject to allocation on the  
10 basis, I guess, we have got what, four allottees here  
11 that lease to the Tribe?

12           MR. VEEDER: There are four. Well, there are  
13 three allotments; 526 is not at the moment in this  
14 matter.

15           THE COURT: But, the total, I think, everybody  
16 would concede, I suppose, that when we get down to  
17 the allocation we are allocating all the water in the  
18 watershed without regard to precisely where it comes  
19 out of the ground or what.

20           MR. VEEDER: Well, I think we differ on that.

21           THE COURT: But, I mean I think that's what the  
22 Circuit has said. I have to keep coming back to that.

23                   Let's go ahead with the testimony. At  
24 least you know my general thinking on it, I guess.  
25

1 THOMAS M. WATSON,

the witness on the stand at the  
2 time of recess, having been  
3 previously duly sworn,  
4 resumed the stand and testified  
5 further as follows:  
6

7 CONTINUED DIRECT EXAMINATION

8 BY MR. VEEDER:

9 Q. Mr. Watson, would you state into the record your  
10 determination based upon -- I would like to rephrase  
11 that.

12 MR. VEEDER: Before we go any further, Your  
13 Honor, I want to make one point very clear. You  
14 asked me the other day what I meant by having the  
15 Department of Justice aligned as an adversary party.  
16 I think that I didn't make myself -- I didn't want  
17 to make the decision. The decision we have now made,  
18 and I am directed by the Tribe to state into the  
19 record that the Tribe has rejected the representation  
20 by the Department of Justice, and that it will refuse  
21 to be bound by any of the arguments by the Department  
22 of Justice, and if a judgment comes down in favor of  
23 the United States, we naturally are going to appeal  
24 it on the basis of what we just heard this afternoon  
25 and this morning.



1 THE COURT: Now, you are not asking me to do  
2 anything about that, are you?

3 MR. VEEDER: Well, you have told me that you want  
4 to know what I meant.

5 THE COURT: Oh, all right.

6 MR. VEEDER: And, you said you would not enter  
7 an order about alignment. I just wanted you to know  
8 where we stand on this, and I want the world to know  
9 where we stand on this.

10 Q. (By Mr. Veeder) Would you state into the record,  
11 Mr. Watson, predicated upon your years of administering  
12 the water for the Colville Confederated Tribes and  
13 working on the issue of available supply, would you  
14 state into the record the basis, the data that you  
15 have utilized in making your determinations? What  
16 have you looked at in making your determinations as  
17 to the amount of water available and the natural flow?

18 MR. PRICE: Your Honor, I think we just spent  
19 about a half an hour discussing that issue, and that  
20 the availability of water was not going to be an  
21 issue before the Court at this time.

22 THE COURT: Well, I think Mr. Veeder has indicated  
23 that he is not at this time quarrelling with the total  
24 availability of water. He is going a little different  
25 route.

1 MR. VEEDER: I am just asking him what he con-  
2 siderers to be the natural flow of the stream without  
3 pumping.  
4 Q (By Mr. Veeder) Would you state that into the  
5 record?  
6 A. Yes. The natural flow of the stream without pumping  
7 is clearly in the area of .5 cubic feet per second.  
8 Q That is a half second foot?  
9 A. That is one-half cfs.  
10 Q Now, from the standpoint of the utilization of that  
11 water in the No Name Creek Basin, would you state  
12 into the record the amount of the acreage that could  
13 have been irrigated using rill irrigation? How many  
14 acres of land can be supplied by that half second foot?  
15 A. Now, speaking specifically --  
16 MR. PRICE: Excuse me.  
17 THE COURT: Just a moment. We have an objection.  
18 MR. PRICE: Your Honor, we don't have a foundation  
19 as to what period of time in terms of with power or  
20 without power, we are talking about in what conditions,  
21 what kind of crops are we talking about. There is just  
22 no foundation at all.  
23 MR. VEEDER: I will go back. I thought that I  
24 made it clear that we are talking about rill irriga-  
25 tion.



1 Q. (By Mr. Veeder) Predicated upon your investigation,  
2 Mr. Watson, predicated upon the record that you have  
3 studied in this case, how much water do you think  
4 that the Timentwas are applying to the approximately  
5 30 acres of land that they were irrigating during the  
6 time that Mary Ann Timentwa was running this property,  
7 administering it?

8 A. I believe that they were using --

9 MR. PRICE: Excuse me. The witness --

10 THE WITNESS: -- approximately one-half cubic feet  
11 per second.

12 MR. PRICE: Again, we have no foundation as to  
13 what period of time. I am not sure there was anything  
14 in the record as to the Timentwas themselves putting  
15 any water to irrigation, anything in the record as  
16 opposed to any non-Indian lessees, and I don't think  
17 we have any foundation at this point.

18 THE COURT: Well, I think we have to know the  
19 time. I understand Mr. Walton testified the other  
20 day that for one example the source of this creek  
21 moved some distance. That I remember.

22 MR. VEEDER: I will start again, Your Honor.

23 THE COURT: Are we talking about today or 50 years  
24 ago?

25 Q. (By Mr. Veeder) Have you looked at the record, Mr.

1           Watson, in regard to the areas that were irrigated  
2           by the Timentwa family? Have you checked the record  
3           on that to determine the acreage?  
4       A.    I have checked the record to determine the acreage,  
5           and I have prepared exhibits on that previously.  
6           That's correct.  
7       Q.    How many acres of land were being irrigated on 901 and  
8           903 based upon the record in this case, say, from  
9           1920, to 1940? Have you checked the record on that?  
10      A.    Yes, I have.  
11      Q.    What does it disclose?  
12      A.    30 to 40 acres.  
13      Q.    Now, based upon your experience with this area for  
14           the last six or seven years, how many acres of land do  
15           you think could be irrigated with a half second foot  
16           of natural flow to which you testified?  
17      A.    I believe that the 30 to 40 acres that were irrigated  
18           by the Timentwas would have required very near the  
19           full natural flow of the stream or one-half cubic feet  
20           per second.  
21      Q.    Now, would you state into the record, Mr. Watson,  
22           the amount of water that you have annually pumped into  
23           the stream for utilization down on 901 and 903, and  
24           the Lahontan Cutthroat Fishery?  
25      A.    We have pumped various amounts of water, Mr. Veeder.



1           That amount is very basically from one and one-half  
2           to two, to two and a half cubic feet per second.

3       Q.     And has that water all been beneficially used, delivered  
4           down there? Has it been utilized, the entire amount?

5       A.     All the water has been beneficially used, with the  
6           exception of some water diverted and wasted by the  
7           Waltons.

8           MR. PRICE: Your Honor, I will object to the  
9           responsiveness of that answer as not being responsive  
10          and having an editorial comment.

11          THE COURT: Well, I will disregard that, Mr.  
12          Price.

13          MR. PRICE: Thank you.

14       Q.     (By Mr. Veeder) Now, Mr. Watson, would you state  
15           into the record the impact upon the natural flow of  
16           the stream that occurs by reason of the well drilled  
17           by Mr. Walton in 1975, at the northern extremity of  
18           Allotment 525? What is the impact upon the natural  
19           flow of the stream by reason of that well?

20       A.     That well --

21           MR. PRICE: Your Honor, excuse me.

22           THE COURT: Just a moment. There is an objection.

23           MR. PRICE: Your Honor, we are going back into the  
24           original trial of this matter that does not relate to  
25           the irrigable acres on the Waltons' property or due

1 diligence. I know what Mr. --

2 THE COURT: It seems to me that we can't go back  
3 and retry all of the issues over the impact of the  
4 pumping here and the pumping there and the stream,  
5 Mr. Veeder, do we?

6 MR. VEEDER: May I point out where we are going  
7 on this thing? The witness has already testified that  
8 there was only enough water in the stream to irrigate  
9 30 to 40 acres at a half second foot.

10 The issue of due diligence is immediately  
11 upon us. How much land could be reasonably developed  
12 with due diligence with a half second foot of water  
13 in the stream by the predecessors.

14 THE COURT: From the stream?

15 MR. VEEDER: That's right, from the natural  
16 stream.

17 THE COURT: All right.

18 MR. VEEDER: Now, we are looking at the impact  
19 that arises when Mr. Walton put in the first big  
20 irrigation well, and we are looking to see what that  
21 impact has been in regard to the half second foot  
22 that was naturally in the stream system.

23 THE COURT: Well, let's go ahead.

24 Q. (By Mr. Veeder) Would you state into the record what  
25 the impact has been and your analysis in arriving at



1 the conclusion as to what that impact was?

2 A. The Walton well at the north boundary of Allotment  
3 525 is the closest well to the spring zone of the  
4 No Name Creek stream.

5 The cone of depression from that well  
6 extends to the south, and that well is in the best  
7 position to capture the most substantial amount of  
8 the spring flow of No Name Creek. That well will have  
9 a substantial affect on decreasing the natural flow  
10 of the No Name Creek stream.

11 Q. When was that well drilled?

12 A. In 1975.

13 Q. Now, Mr. Watson, have you made calculations and  
14 determinations as to the quantity of water naturally  
15 in the stream at this time with the Walton well in  
16 operation and with the pumping on 892 and 526?

17 How much water is there in the state of  
18 nature that you could attribute to the natural flow?

19 A. The natural flow has diminished since the pumping of  
20 the aquifer again. Before pumping, there was up to  
21 .5 cubic feet per second, and now the natural flow is  
22 diminished.

23 I have measured that flow at approximately  
24 .2 of a cubic feet per second at the start of the  
25 irrigation season after the time that pumping commenced.

1 Q. And does that decrease as the summer goes forward?

2 A. As the summer goes forward, the natural flows of

3 No Name Creek stream diminishes to virtually near

4 zero.

5 Q. Now, have you an opinion as to what waters would be

6 allocated on a prorata basis if the pumps that are

7 now in operation are being utilized as have been for

8 the last five years? What water would be available

9 in your view as an expert for allocation? Would it

10 all be pumped water, or would there be stream flow

11 available, natural flow available for apportionment?

12 A. The natural flow, in my opinion --

13 MR. PRICE: Just a minute.

14 THE COURT: Just a moment.

15 MR. PRICE: Your Honor, we are asking the witness

16 to invade the province of the Court at this point.

17 He has testified as to what water was available. I

18 don't think it is appropriate for him to go ahead and

19 try and decipher how it should be prorated.

20 MR. VEEDER: I am not asking that.

21 MR. PRICE: Yes. Excuse me, Counsel. The ques-

22 tion has no other purpose but to try and get this

23 witness to testify in his view what he thinks an

24 appropriate appropriation would be. That's the only

25 place it can be going; otherwise, he's already testified.



1 as to water is available and that's all the further  
2 we need go.

3 THE COURT: Well, I will permit it. As I said  
4 earlier, it is my thinking that whatever rights and  
5 quantities are established in Mr. Walton, if any,  
6 that all the water in the watershed is subject to being  
7 utilized to meet the needs of two parties here, and  
8 whether it is coming out of wells or down the stream  
9 or where it is coming from, I think we have got to  
10 treat all of it, but I will permit Mr. Veeder to  
11 proceed here.

12 Q. (By Mr. Veeder) Would you state into the record the  
13 waters that would be available for apportionment under  
14 the prevailing circumstances with all these wells in  
15 operation, the present wells in operation? Would there  
16 be any natural flow, a usable, natural flow available  
17 for proration?

18 A. The only usable, natural flow available for proration  
19 would range from .2 of a cubic feet per second at the  
20 start of the irrigation season, to zero as the irriga-  
21 tion season progresses.

22 THE COURT: What impact does the pumping by the  
23 Tribe up north have on the flow of the creek assuming  
24 they were not pumping into the creek?

25 THE WITNESS: There definitely is an impact by all

1 of the wells that are pumping from the aquifer.

2 THE COURT: Because the stream really comes  
3 out of the aquifer, I gather.

4 THE WITNESS: That's correct, but the Walton  
5 property is in the south end of the aquifer, and it  
6 is at that location that the spring arises, and it  
7 is the cone of depression of that Walton well that is  
8 capturing that spring flow, so the Walton well has  
9 a more substantial affect in my opinion on the flow  
10 of the stream than the wells of the Tribe.

11 THE COURT: All right.

12 THE WITNESS: Another factor there, Your Honor,  
13 is that water being pumped into the natural stream  
14 is being captured by the Walton well as well.

15 Now, that water is introduced to the stream-  
16 flows out of the bottom of the stream and is captured  
17 by the Walton well so that well is in the best position  
18 to receive water of any well in that aquifer.

19 MR. VEEDER: What we would like to do, Your Honor,  
20 on the basis of the data I have offered here, I would  
21 like to have the Court direct us to present to you a  
22 method of allocation based upon the facts that exist,  
23 and ask for your consideration of it because I think

24 --

25 THE COURT: Well, what I had planned to do in my



present thinking is when we finish the testimony on this matter is to request Counsel to submit proposed findings annotated where appropriate to the record, either today's record or the earlier record, if necessary, and then you can propose what you want, but at the risk of repeating myself, I feel that the duty that I have, aside from these factual questions that were sent back, is to follow the directive of the 9th Circuit.

I don't know how we do it, but you can propose whatever plan you each want to propose. This may not be capable of a simple solution by simple decree. I don't know. Someone might have to go in administratively or otherwise and do some other things here.

MR. VEEDER: This would be the last question in regard to this particular phase of it.

Q. (By Mr. Veeder) Would you state into the record whether the waters that are now being pumped into the stream for delivery to 901 and 903 down the stream is water that would naturally be available in the stream during the irrigation season?

A. Most definitely not.

Q. Would you explain what you mean by that?

A. The water that is being pumped into the natural channel

1 of No Name Creek is far in excess of the natural flow  
2 of that stream.

3 Q. What would be the sequence of it appearing in the  
4 stream system, the natural flow of the stream?  
5 When would that be available, or do you have an  
6 opinion on that?

7 A. I am not sure I understand your question.

8 Q. You are pumping water out today. If that water had  
9 drained out naturally from the stream system, the  
10 spring zone, when would that water be available? Would  
11 it be available during the irrigation season, or  
12 would it be available during the winter months when  
13 it couldn't be used?

14 A. The pumping of the water levels has the effect of  
15 storing the water in the aquifer, and the natural  
16 flow would have been discharging throughout the year  
17 had it not been for the pumping, and consequently,  
18 there would have been a substantial portion of the  
19 natural flow that would have flowed down that stream  
20 during the non-irrigation season and not been  
21 available during the irrigation season.

22 Q. Do you have an opinion as to whether you have been  
23 operating and the Tribe has been operating in the  
24 aquifer as a storage basin, as a surface reservoir?  
25 In effect, are you storing water and saving water by



1           that pumping?  
2       A.    We are conserving substantial amounts of water by that  
3           operation. There is very little water flowing out  
4           during the winter months from the aquifer and into  
5           the spring zone, so consequently, that water is being  
6           conserved for distribution at a time of the year  
7           when it can be put to the use of the most beneficial  
8           purposes.

9       Q.    Now, Mr. Watson, would you turn to your exhibits?  
10           I have got to get the numbers on those. What was the  
11           number on it?

12                        Would you refer to Colville's Exhibit 49,  
13           and state into the record what that exhibit represents?

14       A.    Colville Exhibit No. 49 is an aerial photo of the  
15           No Name Creek Valley covering predominantly the Walton  
16           properties in the south half of that photograph. It  
17           is an aerial photograph that was taken on November  
18           2nd, 1954.

19       Q.    What is 49-A then?

20       A.    49-A is a reproduction of that photograph. It is  
21           precisely the same image, and that image has been  
22           reproduced for the purpose of making delineations of  
23           the property boundaries that are covered by the photo,  
24           and also for the purpose of making delineations along  
25           the land areas.

1 Q Now, I see there is represented on this Exhibit 49-A,  
2 you have a series of numbers. Would you state into  
3 record what those numbers are, please?

4 A The numbers on Exhibit 49-A represent -- first, the  
5 circled numbers represent areas, and the number is  
6 merely an identification of an area on the Walton  
7 property.

8 The number immediately below the circled  
9 number is the area of that land area in acres.

10 Q Who made this map, Exhibit 49-A?

11 A I prepared 49-A.

12 MR. VEEDER: Your Honor, we offer into the record  
13 Tribe's Exhibit 49 and 49-A.

14  
15 VOIR DIRE EXAMINATION

16 BY MR. PRICE:

17 Q Mr. Watson, 49-A purports to depict acreages on the  
18 Walton properties.

19 A It does depict acreage on the Walton properties.

20 Q Acreages broken down as to what, all acreages? He  
21 has 350 acres, minus 12 acres.

22 A This area covers -- this map covers the 350 acres  
23 owned by Mr. Walton. All of the allotments are con-  
24 sidered on this exhibit.

25 Q All right. In what manner were the calculations for



1 the acreages made?  
2 A. The calculations for the acreages were made very  
3 carefully by determining the scale of the photograph,  
4 perimetering all areas within the exterior boundaries  
5 of each of the Walton allotments, and adding those  
6 areas up to determine if they totaled the acreage  
7 of the individual allotments, and they did.

8 THE COURT: What did you say the circled numbers  
9 were?

10 THE WITNESS: The circled numbers are for the  
11 purpose of identifying a particular land area enclosed  
12 by the red boundary line.

13 THE COURT: All right.

14 Q. (By Mr. Price) For instance, just briefly, I see  
15 on the upper 525 Allotment to the east an area that  
16 has no markings in it, but it is still within the  
17 outer boundaries of 525.

18 A. Is that a question?

19 Q. Yes. Is that not true?

20 A. The exhibit, Mr. Price, shows the boundaries of areas  
21 within the valley floor and separately to insure  
22 that the accuracy of the numbers was correct.

23 MR. PRICE: If I may approach the exhibit, Your  
24 Honor --

25 THE WITNESS: But, within the exterior boundaries

1 of the allotment --

2 Q. (By Mr. Price) I am pointing to the exhibit at an

3 area that doesn't have a circled number or any other

4 number on it.

5 A. Yes, sir.

6 Q. If that isn't used to total up, how did you ever

7 come up with a total of 350 acres?

8 A. It was used to total up.

9 Q. It was used?

10 A. It is not shown on this exhibit, but it was used to

11 total up. In fact, I could tell you the area, the

12 acreage of that particular tract.

13 Q. All I need to know --

14 A. 29.1 acres.

15 Q. Why did you put some acreages on and leave some off?

16 A. The acreages that are shown in here are acreages

17 within the valley floor, but the entire acreage of

18 the allotment was measured and each one of those

19 areas was added up to make sure that the total

20 corresponded to the area within the Walton allotment.

21 Q. And this is a 1954 photo?

22 A. 1954 photo during the period of time when there was

23 no substantial vegetative growth. Leaves were off

24 the trees, and this is the only photo during the

25 entire history that was taken during that time period.



1 MR. PRICE: I have no further questions.  
2 MR. VEEDER: We have made our offer, Your Honor.  
3 THE COURT: Is there any objection, Mr. Price,  
4 to the exhibit?  
5 MR. PRICE: No objection, Your Honor.  
6 THE COURT: Mr. Sweeney?  
7 MR. SWEENEY: No objection, Your Honor.  
8 THE COURT: Exhibits 49 and 49-A will be admitted.  
9

10 DIRECT EXAMINATION (Continuing):

11 Q (By Mr. Veeder) Would you start from the southern  
12 extremity of 49-A and refer to the area that you have  
13 designated as 21, and state into the record why you  
14 made that designation and how you made the determina-  
15 tion of acreage in that area?

16 A 21, Area 21 is the southernmost area within the  
17 Walton Allotment 894. That area is bounded on the  
18 east by the No Name Creek, and it is bounded by the  
19 west by the rocks that form the walls of the valley,  
20 until it reaches the point where the rocks intersect  
21 the Walton property boundary, and we have only  
22 measured those areas to the east within the Walton  
23 property boundary.

24 The area is 25.1 acres.

25 Q Are you familiar with the vegetative cover on that

1 piece of land, Mr. Watson?

2 A. Yes, I am.

3 Q. Would you describe it?

4 A. Phreatophytic growth.

5 MR. PRICE: Your Honor, could we have a founda-  
6 tion for when we are talking about?

7 THE COURT: The dates?

8 MR. PRICE: As to when he is talking about?  
9 We have a photograph, a 1954 photograph that he is  
10 referring to.

11 Q. (By Mr. Veeder) Would you state into the record,  
12 Mr. Watson, for the purpose of time, what period of  
13 time have you personally viewed that particular tract  
14 of land which we will call 21 for purposes of the  
15 record?

16 A. I viewed that particular tract of land very frequently  
17 since 1975, and the last time I observed it was  
18 Monday, I believe.

19 Q. When was it?

20 A. Monday.

21 Q. Now, would you state into the record the growth that  
22 is on that particular piece of land that we will call  
23 21?

24 A. The dominant growth on this tract 21 is a very, tall,  
25 coarse grass. It is a very, coarse grass. It's been



1 referred to here as tall, wheat grass.

2 Q. Have you made any investigations yourself as to the  
3 elevation of the water table in that area?

4 A. I have observed the water levels in that area on a  
5 number of occasions, and have visualized standing water  
6 in that area on several occasions.

7 Q. And did you work with Mr. Kaczmarek in regard to the  
8 cross section of the valley and the other geologic  
9 data, the soils data that he testified to earlier  
10 today?

11 A. Mr. Kaczmarek prepared the information. I reviewed  
12 it very carefully.

13 Q. And would you state into the record whether, in your  
14 opinion, water from No Name Creek could be beneficially  
15 applied to that acreage, the 25 acres in 21? Could  
16 water be applied beneficially to that land in its  
17 present condition?

18 A. Not in my opinion.

19 Q. Now, as you cross the creek right directly east to  
20 number 20, would you -- and state into the record  
21 your acquaintance with that, the time period, and  
22 state into the record the growth that is on there,  
23 and whether, in your opinion, water could be bene-  
24 ficially used upon that tract of land?

25 A. The Area 20 is located also in the south end of

1 Allotment 894, on the east side of No Name Creek  
2 within the Walton Allotment 894. It's also located  
3 immediately south of a substantial rock outcrop.

4 The area has a very high water table as  
5 evidenced by the exhibits that have been presented  
6 earlier, and also as evidenced by my own personal  
7 observations of water discharging from the ground  
8 surface in the area along the road on the extreme  
9 eastern side of 894.

10 I have walked through Area 20 on a number  
11 of occasions, and have seen areas there where the  
12 cattle have made impressions in the very soggy, boggy,  
13 wet ground, and there was water standing in those  
14 areas where the cattle had walked across that land.

15 Q. Have you an opinion as to whether water could be  
16 applied to that land beneficially?

17 A. Yes, I do.

18 Q. Would you state into the record what that opinion is?

19 A. My opinion is that water cannot be beneficially  
20 applied to that land.

21 Q. Would you proceed on up the valley?

22 THE COURT: Did you give the area and the number  
23 of acres in Area 20?

24 THE WITNESS: The number of acres, Your Honor,  
25 is 13.8.



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THE COURT: All right.

Q. (By Mr. Veeder) Would you just proceed answering the questions as you go, and we are taking each parcel of land and please state into the record whether the particular land is all within the Walton allotment, and whether, in your opinion, water could be applied beneficially to that land utilizing the No Name Creek water.

THE COURT: Are you restricting that to just utilizing the No Name Creek water, or are you saying it's not irrigable?

MR. VEEDER: Well, I added the No Name Creek because it occurred to me that that's what we are talking about, but we can drop that.

THE COURT: You are saying wherever you get the water, it doesn't do any good to put it on that land?

THE WITNESS: The water table is so near the surface of the ground in that area that throughout the irrigation season any application of water there, to a large degree, has a negative impact.

THE COURT: It reduces the productivity?

THE WITNESS: In my opinion, yes.

THE COURT: All right. Go ahead.

Q. (By Mr. Veeder) So we would just use the terminology whether it is irrigable or non-irrigable in your

1 opinion. Would you proceed in that manner? Refer to  
2 the particular tract that you have delineated, state  
3 the acreage, and give your opinion as to whether water  
4 could be beneficially applied to the tract of land  
5 to which you are referring.

6 A. I will move now to Area 23, which is an area bounded  
7 by the county road on the east, and by the eastern  
8 edge of the Walton property boundary on the west.  
9 It is a moon-shaped area with an acreage of 1.3 acres.

10 That particular area of land is immediately  
11 east of the Walton property included within the  
12 Walton's fence; however, it is Tribal land, and that  
13 area is also in the bottom of the valley floor, and  
14 in my opinion is not irrigable.

15 THE COURT: Now, you are saying that's not Walton  
16 land?

17 THE WITNESS: That's correct.

18 THE COURT: All right.

19 Q. (By Mr. Veeder) Each time, would you state on the  
20 record why it is not irrigable? I think we have to  
21 have that.

22 A. The non-irrigability of Area 23 is for exactly the  
23 same reasons that Area 20 is not irrigable in that it  
24 is a wet, soggy area where the ground water table  
25 is very near the surface of the land.



1                   Moving further to Area 22 --

2                   MR. PRICE: Excuse me, Mr. Watson and the Court,

3                   did we get an acreage on that?

4                   THE COURT: 1.3.

5                   MR. PRICE: Thank you.

6                   THE WITNESS: I am moving to Area 22, which is

7                   also outside the Walton property. It is an area of

8                   6.5 acres immediately east of Walton Allotment 894,

9                   and to some degree, south of the eastern extension of

10                  Allotment 894.

11                  THE COURT: Why are we talking about property that

12                  isn't owned by Mr. Walton?

13                  MR. VEEDER: May I ask a question?

14                  Q. (By Mr. Veeder) To your personal knowledge, did

15                  Mr. Walton ever farm that land?

16                  A. This 1954 photo, Mr. Veeder, at the time Mr. Walton

17                  was occupying the land shows that the land was cul-

18                  tivated and was used for farming purposes at that

19                  time.

20                  MR. PRICE: Do you know?

21                  THE WITNESS: There is an extension of land right

22                  into the Walton property without showing any fence

23                  lines or any characteristics that would distinguish

24                  the land use practices on this area from the land use

25                  practices in the adjacent Walton property.

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MR. PRICE: Your Honor, if I may voir dire at this point.

VOIR DIRE EXAMINATION

BY MR. PRICE:

Q At this point, do you know of your own personal knowledge, whether the land was being cultivated by the Waltons or not?

A This is land that was being cultivated by whoever.

Q You can answer that yes or no, Mr. Watson.

A That land --

Q You can answer that yes or no.

THE COURT: I can't hear the answer because of the additional objections. You say you can't?

THE WITNESS: No, Your Honor. I said whoever was cultivating the land within Allotment 894 at this eastern end was also cultivating the land outside that area, and on the basis of testimony that's been offered here that Mr. Walton was farming that land from 1951, through 1981, I believe, I think it is a fair assumption that he was farming the land.

THE COURT: Although, it is an assumption?

THE WITNESS: Yes, it is.

THE COURT: All right.



1 DIRECT EXAMINATION (Continuing):

2 Q. (By Mr. Veeder) Would you proceed now to the valley  
3 now utilizing the same methods that you adhered to?

4 A. Moving further north into Allotment 894, again we have  
5 an area designated as 17. That area is bounded on  
6 the north by the rock, the rock walls of the valley.  
7 It is bounded on the south by an intermittent stream  
8 channel that runs in a westerly direction, and enters  
9 Allotment 894 on the extreme eastern side, passes  
10 through an area of trees, and then enters a channel  
11 in this 1954 photo that forms a southern boundary  
12 of this area.

13 The western boundary of the area is the  
14 county road that was in place at that time. The  
15 area is 23.7 acres.

16 Q. Did you give the designation, the number?

17 A. It's Area No. 17.

18 Q. And do you have an opinion as to whether that land is  
19 irrigable?

20 A. This land is irrigable to some degree. That's correct.

21 Q. And what is the limiting characteristics on it, to  
22 your own personal knowledge?

23 MR. PRICE: I would object to the leading form  
24 of the question, Your Honor.

25 THE COURT: Well, he can explain his answer. I

1 believe Mr. Watson said it's irrigable to some degree.  
2 What do you mean by that?

3 THE WITNESS: Well, Your Honor, there is a water  
4 table underlying this land. The stream that we are  
5 talking about, the spring that enters Allotment 894  
6 from the east is a surface water stream as it enters  
7 Allotment 894. That water reaches the eastern end of  
8 Area 17 and diffuses underground.

9 There is no longer a visible surface water  
10 source there at all. That water diffuses underground,  
11 and when it encounters the valley floor in Area 15,  
12 that water emerges and forms an extremely wet, boggy,  
13 soggy area.

14 In fact, in this 1954 photo, Area 15 is  
15 full of brush, vegetation, and I was present in the  
16 courtroom when Mr. Wilson Wham testified earlier that  
17 he could not get his equipment on that land to culti-  
18 vate that land because it was wet and soggy, and he  
19 never got on that land to cultivate it.

20 MR. PRICE: Your Honor, I am going to object to  
21 recounting previous testimony. The rest of the record  
22 has to come in at the same time if Mr. Watson is  
23 going to refer to that previous testimony. They dug  
24 out the sump to clear up that water.

25 THE COURT: Well, I think I will restrict this to



1 the testimony that Mr. Watson is giving on direct.

2 Could that water be simply corralled and  
3 then used for irrigation?

4 THE WITNESS: Well, this is water that is present  
5 during the very spring of the year. When I was there  
6 on Monday, I looked at this stream and there is a  
7 small amount of water in that spring at this time of  
8 the year. By the first of July, any usable quantity  
9 of water at that point will be exhausted.

10 THE COURT: What is the land like in July and  
11 August?

12 THE WITNESS: The land in this area in July and  
13 August is presently irrigated by the Defendant Walton,  
14 but not in the spring from No Name Creek.

15 THE COURT: But, you characterized it as irrigable  
16 land then.

17 THE WITNESS: It's partially irrigable. Its  
18 limitation is both water supply and the presence of a  
19 high ground water table beneath those lands.

20 THE COURT: Okay.

21 Q. (By Mr. Veeder) Sir, do you have an opinion that that  
22 could be irrigated, and water could for a period of  
23 time be applied to it beneficially?

24 A. That's correct. Yes.

25 Q. Now, would you move on towards the east from that area

1           that you have described as a swampy area just to the  
2           west of it? Would you proceed describing as you go?

3           MR. PRICE: Your Honor, I would ask that the  
4           reference to swampy be stricken and that Counsel  
5           discontinue the leading nature of his questions.

6           THE COURT: Well, I am not, as I advise jurors,  
7           I am not considering the questions which Counsel ask  
8           as evidence of anything, so don't worry about that.  
9           Let's do keep the testimony with the witness.

10          Okay. Go ahead, Mr. Veeder.

11          THE WITNESS: Continuing to Area No. 15, we have  
12          already described the nature of that. It is a very  
13          soggy, boggy area in 1954. It is a soggy, boggy area  
14          today.

15                 It encompasses 8 acres within Allotment 894,  
16          and it continues on to Tribal land in the corner  
17          formed by the northern boundary of Allotment 894, and  
18          the east boundary of Allotment 2371.

19                 Now, that is Tribal land, but that land has  
20          the same character, and there are three-tenths of an  
21          area in that area.

22                 That same kind of condition extends westward  
23          into Allotment 2371, and into an area described as  
24          12, there are 2.2 acres in Area 12 of the same general  
25          character.



1 All of these lands are non-irrigable. They  
2 have extremely high water tables. It is a discharge  
3 zone for ground water. It is an area where I have  
4 observed piezometers or observation wells flowing with  
5 water where the top of the casing of those water wells  
6 is above the surface of the ground.

7 THE COURT: You referred to Area 15 and 12 and  
8 what other one?

9 THE WITNESS: I am referring to Area 15 with 8  
10 acres in 894.

11 THE COURT: All right.

12 THE WITNESS: I am referring to Area 18 with .3  
13 of an acre on Tribal land, and to Area 12 with 2.2  
14 acres on the eastern side of Allotment 2371.

15 THE COURT: Whose land is that, the 2.2 acres?

16 THE WITNESS: The 2.2 acres is within Allotment  
17 2371, and that is owned by the Waltons.

18 THE COURT: Okay.

19 Q. (By Mr. Veeder) How is the Tribal land utilized?

20 A. The Tribal land is utilized by Mr. Walton for his sump.  
21 His sump crosses that Tribal land.

22 Q. Would you proceed then with the standard responses  
23 that you have been following up to this time?

24 A. The only area that we would bring the Court's atten-  
25 tion to with respect to Allotment 894, is Area 30 con-

1           taining 3.4 acres.

2                   That land again today is in tall wheat grass,  
3           and it is farmed by the Waltons to the extent that  
4           area is farmed, and this land is immediately to the  
5           east -- excuse me -- to the west of Allotment 894,  
6           and is Tribal property.

7                   Going now into Allotment 2371, immediately  
8           north of the south boundary on the west side of No  
9           Name Creek is an area described as Area 13, containing  
10          1.4 acres, and that is an extension of the area  
11          described as 21 and 30 to the south.

12                   Area No. 11, Area No. 10 and 11 are  
13          basically the same kinds of areas, and they are  
14          located on the eastern half of Allotment 2371, east  
15          of No Name Creek, and those areas combined comprise  
16          17.8 acres. It is an area, a very saturated soil,  
17          and it is an area in the 1954 photo that shows standing  
18          water, running water moving from east to west toward  
19          No Name Creek, and that area now is at the northern  
20          end of the Walton sump, but these lands are extremely  
21          wet and application of water such as we see in the  
22          exhibit that was discussed earlier where the sprinklers  
23          are shown sprinkling ponded water, this area is located  
24          right at the boundary between Area 10 and Area 12,  
25          and it is an area that was historically an area of



1 ground water discharge. That area will perpetually be  
2 wet, and it characterizes this whole area described  
3 as 10 and 11.

4 Q. Did you take that photograph which is Exhibit 8?

5 A. Yes, I did.

6 Q. Would you describe and locate that on your map,  
7 Exhibit 49-A, if you would, please?

8 A. Colville Exhibit 8 is located very exactly by the  
9 boundary between the Area 10 and Area 12 shown in  
10 Allotment 2371. It is west of the road, east of No  
11 Name Creek and along the boundary between Area 10 and  
12 12.

13 Q. Now, are there any irrigable lands in your opinion in  
14 the entire area that is depicted on Colville Exhibit  
15 8?

16 A. The Areas 10 and 11, and the areas shown in Colville  
17 Exhibit 8 are substantially non-irrigable.

18 Q. Would you proceed then to review other sections that  
19 you have designated?

20 A. Moving over to Area 9 also in Allotment 2371, and  
21 containing 11.6 acres, this area is immediately west  
22 of No Name Creek, east of the rocks forming the valley  
23 wall, and south of the south boundary of Allotment 525.

24 This area also is an area of high ground  
25 water table, and there is substantial evidence on the

1 photo as evidenced by the coloration of this area that  
2 it is wet.

3 Q. Now, when you say the 1954 photo --

4 A. November 2nd, 1954 aerial photo.

5 Q. Go ahead and explain what you are saying and finish  
6 up.

7 A. This Area 9 is an area with high ground water table  
8 and is substantially non-irrigable.

9 Q. Now, when you say substantially non-irrigable, would  
10 you state into the record and for the Court what you  
11 mean by substantially non-irrigable?

12 A. It would be totally impractical to even begin to  
13 consider the application of large quantities of water  
14 to that land. By large, I don't mean large; I mean  
15 the kinds of water duties that are experienced in  
16 other areas immediately adjacent to the No Name Creek  
17 Valley.

18 When we talk about four acre feet per acre  
19 as a water duty in this area, and that would be a  
20 fairly large quantity of water as compared with a  
21 reasonable application of water on this Area 9, it  
22 would be totally impractical to distribute even a  
23 small percentage of that water duty on this land.

24 Q. On the four acre feet to the acre?

25 A. That's correct.